authorized by the patentee.[15] It is true that the patentee could not prevent the sale, because he is estopped as against the seller from setting up his patent right, but there is no principle of patent law that a purchaser from one who cannot be prevented by the patentee from selling gets implied permission from the patentee to use the article bought.[16] Therefore the judgment in favor of the seller cannot protect the buyer on principles of patent law.

It can serve as a defense for him on principles of *res judicata* only if he is in privity with the seller as to this judgment.[17] It seems clear, however, that he is not. For privity of estate as to a given judgment consists in succession to the right which has been established or limited by the judgment,[18] and the right adjudicated in a suit for the infringement of a patent arises from the patent. An assignee of the patent would, therefore, clearly be in privity with the patentee as to a judgment in such a suit. But not so the assignee of the infringing article, for the right adjudicated is not an incident to the title to the article. The article is concerned merely in that its use was an alleged interference with the patent right;[19] and an assignee of the thing whose use is alleged to infringe the right adjudicated is not in privity with his assignor as to the adjudication.[20]

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JURISDICTION OVER ABSENTEE, BASED UPON PRESENCE OF HIS DEBTOR. — One claimant of a debt, in suing the debtor, made the other claimant, who was in another state, a party. The absentee's claim was adjudged invalid. This was held to bar his subsequent action against the debtor.[1] *Steltzer* v. *Chicago, M. & St. P. Ry. Co.*, 134 N. W. 573 (Ia.). The desirability of such jurisdiction depends upon its fairness to the

[15] Kessler *v.* Eldred, *supra*, is sometimes thought to hold that the judgment is tantamount to an authorization to sell. See Hurd *v.* Seim, 191 Fed. 832, 835. But as we have seen, this case is within the ordinary doctrine of *res judicata*, and the court evidently does not mean to go further than to summarize the effect of this doctrine in saying that the judgment gives the alleged infringer a "right" to sell; for by expressly refusing to decide the rights of the purchaser, they show they did not consider this "right" equivalent to a license to sell.

[16] If there were such a doctrine a sale in a foreign country, and so not tortious as to the patentee, would give the purchaser a right to use the article in the United States. Such, however, is not the law. Boesch *v.* Gräff, 133 U. S. 697, 10 Sup. Ct. 378; Daimler Mfg. Co. *v.* Conklin, 170 Fed. 70.

[17] Litchfield *v.* Goodnow's Admr., 123 U. S. 549, 8 Sup. Ct. 210.

[18] Hart *v.* Bates, 17 S. C. 35, 41.

[19] This case should be distinguished from a case where the defendant sets up a right of his own, which is adjudicated, so that the adjudication binds those to whom he assigns his right. This is often the case in ejectment. *Cf.* Whitford *v.* Crooks, 54 Mich. 261, 20 N. W. 45.

[20] There is an unreasoned case in the Ninth Circuit, *contra*. Norton *v.* San Jose Fruit-Packing Co., 79 Fed. 793. But the absurdity of finding privity in such a case may be shown by a simple example. A. purports to have title to a piece of land. B.'s cow walks across the land. A. sues B. for trespass and loses, failing to prove the validity of his title. B. sells his cow to C., and the cow again crosses the land. Surely no one would contend that A. is barred by the judgment in his suit against B., from suing C. for trespass.

[1] *Contra*, Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 180. Yet this same state early recognized jurisdiction based on garnishment of the absent defendant's creditors. Embree *v.* Hanna, 5 Johns. (N. Y.) 101.

three parties involved. Justice to the plaintiff does not require it. A method, fairer to the other parties, of relieving the plaintiff when the defendant avoids suit by evading him,[2] is to let the plaintiff collect the credit on securing the debtor against liability to the absentee. To the absentee such jurisdiction is unjust in compelling him to come, or to litigate, from afar.[3] This objection is only partly neutralized by the otherwise equal hardship on the plaintiff; the moving, rather than the defending, party in the suit should bear such a burden. Still greater injustice to the absentee lies in the danger that the grossest frauds may be practised upon him, if he have no actual and seasonable notice of the suit;[4] but such notice could be made essential for this class of jurisdiction.[5] To the debtor there would be injustice only in the rare cases in which other countries, denying such jurisdiction, should compel the debtor to pay the former absentee claimant. A favorable Supreme Court decision would prevent this within the United States; and even in the comparatively infrequent cases likely to arise in other common-law[6] countries, it is not clear that they would deny the debtor the defense of the former judgment; in England, for example, the point has not yet been presented for decision.[7]

Analogy constitutes the only justification of the proposed type of jurisdiction. It is no more objectionable, on principle, than jurisdiction based on the domicile,[8] or allegiance,[9] of the defendant, or on the attachment of his local tangible property,[10] or garnishment of his debtors.[11] In all these the absentee is, equally as much as in the suggested type of jurisdiction, required to come, or to litigate, from afar; and in none, with the possible exception of attachment proceedings, is the absentee any more likely to know of the suit. Even if the *dicta* in some garnishment cases, that the garnishee, to protect himself, must notify his creditor,[12] should become law, the same could apply equally to suits such as in the principal case. Furthermore, none of these other types give the

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[2] The plaintiff would not have even this difficulty if jurisdiction could be founded on domicile or citizenship; but the decisions on this point are conflicting. See footnotes 8 and 9, *infra*.

[3] See Missouri Pacific Ry. Co. *v.* Sharitt, 43 Kan. 375, 386, 23 Pac. 430, 434.

[4] See Missouri Pacific Ry. Co. *v.* Sharitt, *supra*.

[5] In the principal case the absentee had actual notice, though this was not required by the statute.

[6] As jurisdiction in civil-law countries is based on entirely different grounds from those in force in common-law countries, the former would probably give neither greater nor less effect to common-law jurisdiction of the proposed type than to any other type of jurisdiction peculiar to the common law.

[7] Dicey makes no mention of any English law on the point. Note his general comment. DICEY, CONFLICT OF LAWS, 2 ed., 366.

[8] Such jurisdiction was recognized in Huntley *v.* Baker, 33 Hun (N. Y.) 578; Henderson *v.* Staniford, 105 Mass. 504. *Contra*, De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345; Raher *v.* Raher, 129 N. W. 494.

[9] Such jurisdiction was recognized in Ouseley *v.* Lehigh Valley Trust Co., 84 Fed. 602. *Contra*, Smith *v.* Grady, 68 Wis. 215, 31 N. W. 477.

[10] Such jurisdiction was recognized in Cooper *v.* Reynolds, 10 Wall. (U. S.) 308.

[11] Such jurisdiction was recognized in Chicago, Rock Island, etc. Ry. *v.* Sturm, 174 U. S. 710, 19 Sup. Ct. 797; Harvey *v.* Thompson, 128 Ga. 147, 57 S. E. 104. *Contra*, Missouri Pacific Ry. Co. *v.* Sharitt, *supra*.

[12] See Morgan *v.* Neville, 74 Pa. St. 52, 57; Harris *v.* Balk, 198 U. S. 215, 227, 25 Sup. Ct. 625, 628.

plaintiff a just relief which is not obtainable with more fairness to the defendant. Only in attachment and garnishment is such relief afforded; the plaintiff could be fully protected by permitting attachment or garnishment merely to maintain the *status quo*, pending suit in a state more properly having jurisdiction over the defendant.[13] A distinction between the new class of jurisdiction, and all others except that based on garnishment of the absentee's creditors, is that only garnishment and the proposed type present the possibility of injustice, in rare cases, to the debtor; but this is a rather minute consideration.

The proposed type of jurisdiction is helped not only by the fact that many other types are no more justifiable, but also by its close analogy to jurisdiction based on garnishment. Each of these two types includes a suit against a debtor within the state, and a suit against an absentee; the difference is merely that the proposed type seeks to disestablish the absentee's right to the principal debt, and garnishment to establish the absentee's indebtedness to the plaintiff.

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EQUITABLE DECREE AS CAUSE OF ACTION IN ANOTHER STATE. — The law of the *situs* governs the creation of legal and equitable interests in land. If that law creates a valid trust, the courts of another jurisdiction will recognize it, even though by the law of the forum a trust would not be created.[1] Conversely, if the law of the *situs* does not predicate a trust upon certain acts, a foreign jurisdiction will not impose a trust, although its law would create one from those acts.[2] In this country, these principles apply even to marriage settlements.[3]

Equity does, however, exercise some power over foreign land. Acting *in personam*, it may decree specific performance of a contract to convey,[4] or require deeds to rectify a boundary.[5] Even though the law of the *situs* would not recognize a right to a conveyance, equity may decree a conveyance as a remedy for a tort,[6] or breach of contract.[7]

A recent case raises the interesting question of the effect of such a decree in the jurisdiction where the land is. *De Graffenried* v. *De Graffenried*, 132 N. Y. Supp. 1107 (App. Div.). A Swiss court granted a divorce to a wife. Swiss law, on a decree of divorce against the husband, requires him to reconvey property which the wife has transferred to him during the marriage. The wife in New York sought a reconveyance

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[13] This is the procedure employed in France and Belgium. Todesco *v.* Dumont, 18 Journal du Droit International Privé, 559. See BAR, INTERNATIONAL LAW (Gillespie's translation), 536–537.

[1] *In re* Fitzgerald, [1904] 1 Ch. 573; Knox *v.* Jones, 47 N. Y. 389.

[2] Acker *v.* Priest, 92 Ia. 610, 61 N. W. 235. See 20 HARV. L. REV. 382.

[3] Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569. In England, it is held that the law of the place of the contract governs the future acquisitions of property. De Nichols *v.* Curlier, [1898] 1 Ch. 403. See 12 HARV. L. REV. 138.

[4] Sutphen *v.* Fowler, 9 Paige (N. Y.) 280; Newton *v.* Bronson, 13 N. Y. 587.

[5] Penn *v.* Lord Baltimore, 1 Ves. 443.

[6] Lord Cranstown *v.* Johnston, 3 Ves. Jr. 170.

[7] *Ex parte* Pollard, Mont. & C. 239.